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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

LACEY RANA SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—during a lawful traffic stop—an officer's request for consent to search a passenger's purse "without reasonable suspicion unconstitutionally broadens a traffic investigation," *Illinois v. Caballes*, 543 U.S. 405, 421 n.3 (2005) (Ginsburg, J., dissenting), when the officer's actions do not prolong the stop?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 8

I. The Kansas Supreme Court Decided An Important And Recurring Fourth Amendment Question In A Factual Context That This Court Has Never Addressed, And Did So In A Way That Conflicts With Recent Decisions Of This Court, Of The Federal Circuits, And Of Several State Supreme Courts 8

A. The Court Has Never Addressed The Fourth Amendment Scenario This Case Presents 8

B. The Kansas Supreme Court Decision Conflicts With Federal Circuit And State Supreme Court Decisions 11

TABLE OF CONTENTS
(Continued)

Page

C. The Kansas Supreme Court Decision Conflicts With This Court's Recent Decisions 17

CONCLUSION 21

APPENDIX

State v. Smith, No. 96,189 (Kan. May 30, 2008) 1a

State v. Smith, No. 96,189 (Kan. Ct. App. Jan. 26, 2007) 29a

TABLE OF AUTHORITIES

Page

CASES

Brendlin v. California,
551 U.S. ___, 127 S. Ct. 2400 (2007) 4, 17

Florida v. Bostick,
501 U.S. 429 (1991)..... 18, 19, 20

Florida v. Royer,
460 U.S. 491 (1983)..... 19

Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County,
542 U.S. 177 (2004)..... 7

Illinois v. Caballes,
543 U.S. 405 (2005)..... *passim*

Marinaro v. State,
163 P.3d 833 (Wyo. 2007) 13

Michigan v. Summers,
452 U.S. 692 (1981)..... 7

Muehler v. Mena,
544 U.S. 93 (2005)..... *passim*

People v. Gonzalez,
789 N.E.2d 260 (Ill. 2003)..... 14

People v. Harris,
886 N.E.2d 947 (Ill. 2008)..... 13, 14, 15

Salmeron v. State,
632 S.E.2d 645 (Ga. 2006) 13, 16, 17

State v. Cunningham,
No. 2006-024, 2008 WL 1030884 (Vt. 2008) 16

TABLE OF AUTHORITIES
(Continued)

Page

State v. Smith,
184 P.3d 890 (Kan. 2008) 1

State v. Smith,
No. 96,189, 2007 WL 220162 (Kan. Ct. App. Jan. 26, 2007) 1

State v. Stewart,
181 P.3d 1249 (Idaho 2008) 13

Terry v. Ohio,
392 U.S. 1 (1968) ..... *passim*

United States v. Drayton,
536 U.S. 194 (2002) 18

United States v. Hernandez,
418 F.3d 1206 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 303 (2006) 12

United States v. Martin,
422 F.3d 597 (7th Cir. 2005), *cert. denied*, 546 U.S. 1156 (2006) 12

United States v. Mendez,
467 F.3d 1162 (9th Cir. 2006) 13, 14

United States v. Mendez,
476 F.3d 1077 (9th Cir.), *cert. denied*, 127 S. Ct. 2277 (2007) 12

United States v. Slater,
411 F.3d 1003 (8th Cir. 2005) 12

United States v. Soriano-Jarquin,
492 F.3d 495 (4th Cir. 2007) 12

TABLE OF AUTHORITIES
(Continued)

Page

United States v. Stewart,
473 F.3d 1265 (10th Cir. 2007) 12

United States v. Turvin,
517 F.3d 1097 (9th Cir. 2008) 12, 17

United States v. Valenzuela,
494 F.3d 886 (10th Cir. 2007) 16

United States v. Vandyck-Aleman,
No. 06-60128, 2006 WL 2794416 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1168 (2007) 12

United States v. Wallace,
429 F.3d 969 (10th Cir. 2005) 5

CONSTITUTIONAL PROVISION AND STATUTE

U.S. CONST. amend. IV 1

28 U.S.C. § 1257(a) 1

RULE

SUP. CT. R. 13.1 1

SECONDARY AUTHORITIES

Petition for Writ of Certiorari, *Arizona v. Gant*,
No. 07-542 (U.S. Oct. 19, 2007) 9

Petition of Writ of Certiorari, *Arizona v. Johnson*, No. 07-1122
(U.S. Feb. 27, 2008) 9

Wayne R. LaFave, 4 *Search and Seizure: A Treatise On The Fourth Amendment* (4th ed. 2004) 15

TABLE OF AUTHORITIES
(Continued)

Page

Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 Champion (Nov.) 34 (2007) 15

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The May 30, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a–28a) is reported at 184 P.3d 890 (Kan. 2008). The Kansas Court of Appeals' opinion (Pet. App. 29a–35a) is unpublished. No. 96,189, 2007 WL 220162 (Kan. Ct. App. Jan. 26, 2007).

JURISDICTION

The Kansas Supreme Court rendered its decision on May 30, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

STATEMENT

1. In the early morning hours of September 22, 2005, Officer Nick Carter lawfully stopped a car with

a broken taillight in Winfield, Kansas. Pet. App. 3a. Respondent, Lacey Rana Smith, was a passenger in that car. She exited the vehicle and sat on nearby steps. *Id.* Officer Carter spoke to the driver and checked the car's license plate information (the tag was expired and turned out to be illegal). Aside from briefly greeting Respondent, Officer Carter interacted solely with the driver. *Id.* at 4a.

Meanwhile, Officer Cory Gale learned of the stop by his police radio and arrived at the scene to provide backup assistance. Pet. App. 4a. Officer Gale recognized Respondent and, based on previous knowledge of her, he suspected she might possess illegal drugs. *Id.* He approached Respondent and asked her "how she was doing and if he could look inside her purse." *Id.* Respondent consented to a search of her purse, and Officer Gale discovered a bag containing methamphetamine. *Id.*

Officer Gale arrested Respondent and took her to the police station. Pet. App. 4a. When Officer Gale and Respondent departed for the police station, Officer Carter was still in the process of issuing a citation to the driver and had not completed the traffic stop. *Id.* At the station, Officer Gale discovered drug paraphernalia in Respondent's possession and Respondent made some incriminating statements. *Id.*

2. Respondent was charged in state court with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. Pet. App. 4a. She moved to suppress the methamphetamine that Officer Gale seized from her

purse, the drug paraphernalia he found in her possession, and the incriminating statements she made at the police station. *Id.* The State conceded that Officer Gale did not have reasonable suspicion to support his request to search Respondent's purse, but argued that Respondent gave valid consent to the search. *Id.* at 5a. The trial court suppressed the evidence, holding that Respondent had been lawfully seized when Officer Carter stopped the car in which she was a passenger, but that Officer Gale's questions to her exceeded the proper scope of the traffic stop. *Id.* The State appealed.

3. The Kansas Court of Appeals reversed the trial court. First, the court of appeals held that Respondent was "seized," but lawfully, as the passenger in a car stopped for a traffic violation. Pet. App. 32a. The court of appeals focused on whether Officer Gale's questions invalidated the otherwise lawful traffic stop. Opining that prior to the Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), Officer Gale's questions unrelated to the purpose of the stop would have rendered the seizure illegal, Pet. App. 33a, the court of appeals declared that *Mena* had altered the legal landscape: "Pursuant to the Supreme Court's holding in *Mena*, however, police officers may now question a person during a detention about matters unrelated to the reason for the detention." Pet. App. 33a–34a.

Applying *Mena*, the court of appeals observed that "[h]ere, since the initial stop was legal, it was permissible for Gale to question Smith about matters unrelated to the purpose of that stop so long as the

questions did not increase the duration of the stop." Pet. App. 34a. In terms of prolonging the stop, the court of appeals pointed out that "[n]either of these questions extended the length of the stop. Carter was still in the process of issuing the citation to the driver when Gale arrested Smith." *Id.* Thus, the only remaining issue was whether Respondent's consent was valid. On that point, the court concluded that Respondent "has offered nothing to indicate she was forced or coerced in any fashion to allow Officer Gale to search her purse." *Id.* at 35a.

4. The Kansas Supreme Court reversed the Court of Appeals. The supreme court framed the issue as whether *Mena* alters the proposition that a police officer violates the Fourth Amendment and the Kansas Constitution "by asking a passenger in a vehicle stopped for a traffic violation to consent to a search that is unrelated to the purpose of the stop." Pet. App. 2a. The court answered in the negative, holding that "*Mena* does not overrule longstanding precedent limiting the scope of an investigatory detention, does not address the question of the scope of an investigatory detention, and is factually and legally distinguishable from this case." *Id.* at 3a.

After reviewing the facts and lower court proceedings, the supreme court first concluded that Respondent had been subjected to a "seizure" within the meaning of the Fourth Amendment, relying primarily on this Court's decision in *Brendlin v. California*, 551 U.S. ___, 127 S. Ct. 2400 (2007), holding "that a passenger in a vehicle is seized for Fourth Amendment purposes when a law

enforcement officer stops the vehicle through a show of authority and the passenger does not flee." Pet. App. 10a. The court then focused on the proper scope of the traffic stop. Acknowledging that Respondent conceded the initial vehicle stop was lawful, the supreme court stated that the key question was "whether the detention was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 12a.

The supreme court recognized that, "[a]fter the *Mena* decision, the Tenth Circuit adopted a broader approach to a law enforcement officer's questioning during a traffic stop, holding 'there is no Fourth Amendment issue with respect to the content of the questions' if the stop's duration is not extended." Pet. App. 15a (quoting *United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005)). Recognizing that the Kansas Court of Appeals "relied upon this contemporary line of Tenth Circuit decisions," Pet. App. 15a, in reversing the trial court, the supreme court opined that the court of appeals' "reliance on these cases was misplaced, however." *Id.* The Kansas Supreme Court further opined that the Tenth Circuit cases were distinguishable from this case, because generally they involved police officers asking questions and developing reasonable suspicion as a result of the answers, not police officers asking for consent to search with no basis for suspicion. *Id.* Finally, the supreme court cited Tenth Circuit cases that it read as declining to apply the *Mena* rule when the officers simply asked for consent to search. *Id.* at 15a–16a.

The supreme court next opined that the Tenth Circuit's cases might be internally contradictory, offering "no explanation of why the rule [against asking for consent without any basis for suspicion] remains valid in light of the [Tenth Circuit's] expanded view regarding the permissible scope of a traffic stop." Pet. App. 16a. The supreme court suggested that the Tenth Circuit's cases raise unanswered questions, such as whether consent searches in these circumstances exceed the proper scope of a *Terry* stop, whether consent searches impermissibly prolong the duration of a stop, and whether the consent in such cases was to be deemed involuntary as a matter of law? *Id.* Finding the Tenth Circuit precedent lacking in "clarification," *id.*, the Kansas Supreme Court declared that it must look to this Court's cases to resolve the issue presented.

The Kansas court began with this Court's decision in *Muehler v. Mena*. In *Mena*, in the context of the search of a residence pursuant to a valid warrant, the Court held that police questioning unrelated to the purpose of the search, when such questioning does not prolong the search or seizure, does not violate the Fourth Amendment. The Kansas court recognized that *Mena* stands for the proposition that questioning alone does "not create an additional seizure" subject to Fourth Amendment requirements. Pet. App. 18a. And the Kansas court pointed out that *Mena* cited *Illinois v. Caballes*, 543 U.S. 405 (2005), Pet. App. 19a, a traffic stop case in which the Court held that deploying a trained drug canine to sniff the exterior of a car during a traffic stop lawful at its inception and otherwise executed in a reasonable manner does

not change the encounter into a drug investigation, nor are police required to have independent reasonable suspicion of criminal activity for such deployment.

The Kansas Supreme Court opined that "[n]either the *Mena* or the *Caballes* majority decisions discussed *Terry* nor the scope of a *Terry* stop." Pet. App. 19a. Instead, the Kansas court focused on two other decisions which predate *Mena* and *Caballes*. First, the court considered *Michigan v. Summers*, 452 U.S. 692 (1981), a case in which the Court applied the *Terry* analysis in addressing "the reasonableness of detaining occupants of a residence while a search warrant was executed." Pet. App. 20a. Second, the Kansas court relied on *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004), a case in which the Court applied the *Terry* analysis in upholding the constitutionality of a state statute that made it a crime to refuse to identify oneself if requested to do so by a police officer. Pet. App. 22a.

The Kansas court read *Hiibel* as a "recent reaffirmation of *Terry* principles" and opined that the Court had made a "careful limitation of the issue in *Caballes* and *Mena* to the question whether there was an additional search or seizure." Pet. App. 26a. "Consequently, we hold that the Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search." *Id.* Finally, the Kansas Supreme Court concluded that

Respondent's consent was invalid because it was tainted by Officer Gale exceeding the proper scope of the traffic stop, and thus all evidence and statements flowing from Officer Gale's questions were fruit of the poisonous tree. *Id.* at 27a–28a.

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court Decided An Important And Recurring Fourth Amendment Question In A Factual Context That This Court Has Never Addressed, And Did So In A Way That Conflicts With Recent Decisions Of This Court, Of The Federal Circuits, And Of Several State Supreme Courts

A. The Court Has Never Addressed The Fourth Amendment Scenario This Case Presents

In *Terry v. Ohio*, 392 U.S. 1, 20 (1968), the Court held that, in determining whether a temporary investigative stop is reasonable, the Fourth Amendment requires the following two inquiries: (1) whether an officer's actions were justified at their inception; and, (2) whether the officer's subsequent actions were reasonably related in scope to the basis for the intrusion in the first place. Although *Terry* creates a general framework for analyzing temporary police stops, the Court since *Terry* has decided many cases involving such encounters, sometimes applying the *Terry* factors to the specific facts of a case, and sometimes announcing general rules governing police conduct during investigative stops.

The Court has never addressed an investigative stop in the factual context presented in this case:

during a lawful traffic stop, police question a passenger on matters unrelated to the basis for the stop, including a request for permission to search a passenger's purse or bag. Indeed, in a recent case involving the use of a drug sniffing dog during routine traffic stops, Justice Ginsburg pointed out in dissent that "[t]he question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation is not before the Court." *Caballes*, 543 U.S. at 421 n.3. (This Court has granted certiorari in two Fourth Amendment cases involving traffic stops and passengers for this Term, but neither involves the *questioning* of passengers. *See Arizona v. Gant*, No. 07-542 (cert. granted Feb. 28, 2008) ("Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?"); *Arizona v. Johnson*, No. 07-1122 (cert. granted June 23, 2008) ("In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?").)

This case implicates important Fourth Amendment questions that arise regularly in the course of routine traffic stops. These questions include (1) whether police questioning of a passenger in a lawfully

stopped vehicle on matters unrelated to the reasons for the stop is subject to *Terry* analysis and, if so, (2) whether such questioning satisfies the second *Terry* requirement when an officer's actions do not prolong the stop.

The two decisions closest to the facts of this case may be *Mena* and *Caballes*, but neither presents the same factual scenario. *Mena* involved the search of a residence pursuant to a valid search warrant, and during the search police questioned one of the occupants about a matter unrelated to the search, eliciting incriminating information. The Court unanimously held that there was no Fourth Amendment violation because, unless "the detention [is] prolonged by the questioning, there [is] no additional seizure within the meaning of the Fourth Amendment." 544 U.S. at 101. Nowhere in the majority opinion did the Court cite *Terry* or discuss or apply the *Terry* analysis.

In *Caballes* the Court held that deploying a trained drug canine to sniff the exterior of a car during a traffic stop that was both lawful at its inception and otherwise executed in a reasonable manner does not change the encounter from a lawful traffic stop into a drug investigation requiring the police to have independent reasonable suspicion before deploying the dog. 543 U.S. at 408. Like *Mena*, the Court in *Caballes* did not cite or discuss *Terry*.

Justice Ginsburg dissented in *Caballes*, arguing that the Court had limited or undermined the second prong of *Terry*—which is whether the officers' actions were reasonably related in scope to the initial basis

for the stop. Justice Ginsburg would have applied the second *Terry* inquiry and concluded that the canine sniff impermissibly expanded the scope of the initially lawful vehicle stop, opining that

> [t]he unwarranted and non-consensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment. The Court rejects the Illinois Supreme Court's judgment and, implicitly, the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search.

543 U.S. at 420–21.

In any event, the Court has not decided a case involving the recurring factual scenario at issue here. At a minimum, Justice Ginsburg's *Caballes* dissent and the Kansas Supreme Court's decision below certainly suggest that it may not be clear how this Court would resolve the important Fourth Amendment question that this case presents. Though Petitioner believes, as explained below in Part I.C., that the Court's recent decisions go a long way toward answering the question presented here, a grant of certiorari and a decision by this Court would settle the matter for the lower courts and for law enforcement officers across the nation.

B. The Kansas Supreme Court Decision Conflicts With Federal Circuit And State Supreme Court Decisions

Since *Mena* and *Caballes*, the federal circuits have uniformly held that the Fourth Amendment allows police to ask questions unrelated to the reasons for

the original detention, so long as the questions do not prolong the detention. *See, e.g., United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007) (because the police request did not extend the stop, it did not alter the stop's lawfulness); *United States v. Martin*, 422 F.3d 597, 601–02 (7th Cir. 2005) (a traffic stop does not become unreasonable merely because an officer asks questions unrelated to the initial purpose of the stop), *cert. denied*, 546 U.S. 1156 (2006); *United States v. Slater*, 411 F.3d 1003, 1005 (8th Cir. 2005) (request for identification unrelated to the stop did not violate the Fourth Amendment); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008) (the Fourth Amendment is not violated by a request for consent to search that does not prolong the traffic stop); *United States v. Mendez*, 476 F.3d 1077, 1080–81 (9th Cir. 2007) (because the officer's questions did not prolong stop, they need not be supported by reasonable suspicion), *cert. denied*, 127 S. Ct. 2277 (2007); *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007) (if the initial detention is lawful, the Fourth Amendment inquiry is whether police questioning extended the length of the detention; the content of the questions is irrelevant); *United States v. Hernandez*, 418 F.3d 1206, 1209, n.3 (11th Cir. 2005) (*Mena* applies to traffic stops, and unrelated questioning that does not prolong detention is not determinative of constitutionality), *cert. denied*, 127 S. Ct. 303 (2006); *United States v. Vandyck-Aleman*, No. 06-60128, 2006 WL 2794416, at *2 (5th Cir. 2006) (unpublished) (unrelated questioning is not a seizure implicating the Fourth Amendment), *cert. denied*, 127 S. Ct. 1168 (2007).

At least until this case, state supreme courts also have read *Mena* and *Caballes* to permit unrelated questioning during a lawful stop or detention, again so long as such questioning does not prolong the stop. *See, e.g., People v. Harris*, 886 N.E.2d 947, 960–61 (Ill. 2008) (on remand after a grant, vacate, and remand order from this Court in light of *Caballes*, *see* 543 U.S. 1135 (2005)) (during a lawful seizure, the police may ask questions unrelated to the original detention and are not required to form an independent reasonable suspicion of criminal activity before doing so); *Salmeron v. State*, 632 S.E.2d 645, 646 (Ga. 2006) (citing *Mena* and holding that the Fourth Amendment is not violated during a traffic stop when an officer asks the driver or passengers for consent to search); *State v. Stewart*, 181 P.3d 1249, 1255 (Idaho 2008) (under *Mena*, when a suspect is reasonably detained in the first place, officers' questions unrelated to the original reason for that detention do not violate the Fourth Amendment); *Marinaro v. State*, 163 P.3d 833, 835 (Wyo. 2007) (citing *Mena* and *State v. Stewart* and holding that during a legal detention officers may pose questions unrelated to the underlying purpose of the detention without independent reasonable suspicion).

Two of the preceding decisions illustrate how the lower courts have interpreted the Court's decisions in *Mena* and *Caballes*, and they provide a sharp contrast to the Kansas Supreme Court's reading of *Mena* and *Caballes* in this case. In *United States v. Mendez*, 467 F.3d 1162 (9th Cir. 2006), a divided panel of the Ninth Circuit reversed a district court's denial of Mendez's motion to suppress his answers to

police questions unrelated to a traffic stop for a license plate violation. The panel ruled that questions regarding Mendez's tattoos, gang activities, and criminal history exceeded the scope of a permissible traffic stop interrogation. *Id.* at 1175.

The government requested en banc review of the panel's decision, but while that request was pending, the panel withdrew its original opinion and issued a superseding opinion, based on this Court's then-recent decisions in *Mena* and *Caballes*. In the superseding opinion, the panel changed course and affirmed the denial of the motion to suppress. In so doing, the panel unanimously held that police questioning unrelated to the reason for a lawful traffic stop need not be supported by independent reasonable suspicion. *Mendez*, 476 F.3d at 1080.

In *People v. Harris*, the Illinois Supreme Court likewise reversed course after this Court's decisions in *Mena* and *Caballes*. Following a grant, vacate, and remand order by this Court for reconsideration in light of *Caballes*, (543 U.S. 1135 (2005)), the Illinois Supreme Court unanimously overruled its prior decision in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003). In *Gonzalez*, a car stop case, the court had held that the second prong of the *Terry* inquiry contained two sub-parts: whether the duration of the stop was impermissibly prolonged, and whether the police conduct altered the fundamental nature of the stop. *Id.* at 260. After this Court's decisions in *Mena* and *Caballes*, however, the Illinois Supreme Court reversed itself, holding that "[i]n light of *Muehler* [*v. Mena*], it becomes clear that *Caballes* rejected

reasoning that led to this court's adoption of the 'fundamental alteration of the nature of the stop' portion of the 'scope' prong of *Gonzalez*. All that remains is the duration prong." *Harris*, 886 N.E.2d at 960.

At least two criminal procedure scholars have discussed the question whether *Mena* and *Caballes* altered the application of *Terry* in the context of police questioning about matters unrelated to the initial reason for an otherwise lawful stop. First, Professor Maclin asserts that the lower courts have misunderstood *Caballes* and *Mena*, and that the second inquiry of *Terry* remains valid and operative in this context. Professor Maclin argues that police must have independent reasonable suspicion of criminal activity before asking questions unrelated to the justification for the initial stop. *See* Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 Champion (Nov.) 34 (2007) (publication of the National Association of Criminal Defense Lawyers). In Professor Maclin's view, the Kansas Supreme Court here was correct, but all of the cases cited above were wrongly decided.

Professor LaFave takes essentially the same view. He acknowledges that *Mena* and *Caballes* can be read as the lower courts generally have read them—to allow questioning on any subject so long as the stop is not prolonged. But Professor LaFave argues that, so read, *Mena* and *Caballes* are "dead wrong" on the merits and at odds with the *Terry* line of decisions on the limits applicable to temporary stops. Wayne R. LaFave, 4 *Search and Seizure: A Treatise*

On The Fourth Amendment, § 9.3, p. 20 (4th ed. 2004).

Some individual state supreme court justices have argued that *Terry* continues to limit questioning and police investigative activity during traffic stops, expressing agreement with Justice Ginsburg's dissent in *Caballes*. *See, e.g.*, *State v. Cunningham*, No. 2006-024, 2008 WL 1030884, at ¶ 40 (Vt. 2008) (Skoglund, J., concurring) ("As Justice Ginsburg aptly put it in *Illinois v. Caballes*, '[e]ven if [a] drug sniff is not characterized as a . . . 'search,' [a] sniff surely broaden[s] the scope of [a] traffic-violation-related seizure); *Salermon*, 632 S.E.2d at 648-49 (Sears, J., Hunstein, J., Benham, J., dissenting) (*Mena* replaces a reasonableness standard with allowing "any and all manner of interrogation.")

In any event, the Kansas Supreme Court erred in this case, both in its Fourth Amendment analysis and in the ultimate conclusion it reached. It is undisputed that Officer Gale's questions to Respondent did not prolong the lawful traffic stop. The fact that one question was a request for consent to search Respondent's purse does not change the analysis, but rather further emphasizes that the Kansas Supreme Court decided this case in a way that conflicts with the decisions of other courts. *See, e.g.*, *United States v. Valenzuela*, 494 F.3d 886, 891 n.2 (10th Cir. 2007) ("As a final note, we point out that the fact [the officer] asked for consent to search . . . instead of some other question is irrelevant. [Tenth Circuit case law post-*Mena*] makes clear that the content of an officer's questions is unimportant so

long as the questions do not unreasonably delay the stop."); *Salmeron*, 632 S.E.2d at 646 ("The Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer questions the driver or occupants of a vehicle and requests consent to conduct a search."); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008) (same).

Ultimately, as the Kansas Supreme Court decision makes clear, some lower courts may be uncertain about the proper analysis in cases such as this. Moreover, the Kansas decision goes against the majority of lower court decisions, and imposes on law enforcement officers in Kansas two different standards for traffic stops—the Tenth Circuit's standard allowing unrelated questions (the majority view) and the Kansas Supreme Court's standard prohibiting such questions. The conflict of authority here is real, and it involves an important Fourth Amendment question that merits a grant of certiorari.

C. The Kansas Supreme Court Decision Conflicts With This Court's Recent Decisions

On the merits, the Kansas Supreme Court erred in this case. This Court has held that, as a general rule, when police stop a vehicle with a show of authority they seize not only the driver but also the passengers. *Brendlin v. California*, 127 S. Ct. at 2407 ("A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver.") But that does not lead to the Kansas Supreme Court's erroneous conclusions that an officer's subsequent questioning of a passenger is subject to the *Terry*

analysis, nor that such questioning must be based on reasonable suspicion.

Instead, the Court has "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Thus, the Court has held

> that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, *and request consent to search* his or her luggage—as long as the police do not convey a message that compliance with their requests is required.

Id. at 434–35 (internal citations omitted, emphasis added); *see also United States v. Drayton*, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.")

Importantly, *Muehler v. Mena*, relying on *Bostick* and *Caballes*, makes clear that, unless "the detention [is] prolonged by the questioning, there [is] no additional seizure within the meaning of the Fourth Amendment." *Mena*, 544 U.S. at 101. Indeed, on that point the Court in *Mena* was ***unanimous***. In this case, it is indisputable that Officer Gale did not violate the "*Mena* rule" (permitting questions unrelated to the stop) by prolonging the stop.

Officer Gale's two, brief questions to Respondent ("how she was doing and if he could look inside her purse"? Pet. App. 4a, 30a) in no way prolonged the

traffic stop. In fact, it is undisputed that Officer Gale discovered methamphetamine in Respondent's purse, arrested her, and departed with her to the police station *before* Officer Carter completed the traffic stop. Pet. App. 4a ("Officer Carter was still in the process of issuing a citation to the driver when Officer Gale and Smith left the scene."); *id.* at 30a ("Carter was still in the process of issuing a citation to the driver when Gale and Smith left.").

Mena, *Bostick*, and *Caballes* should control the outcome here; they may even compel the conclusion that there is no *Terry* violation. Indeed, the Court has held that the Fourth Amendment is not violated by a request to search a person's luggage, so long as it is clear the person has the right to refuse. *E.g. Bostick*, 501 U.S. at 435 (citing *Florida v. Royer*, 460 U.S. 491 (1983)). The same should hold true in the context presented here.

The Kansas Supreme Court erred when it applied the second *Terry* inquiry to invalidate the consensual search of Respondent's purse. As a result, that court has unnecessarily limited the ability of police in Kansas to conduct investigations during lawful traffic stops and other temporary detentions.

* * * * * * *

Kansas believes the Court's decisions in *Mena*, *Bostick*, and *Caballes* control, and that they point to the proper outcome in this case. The Kansas Supreme Court, however, ruled that this Court apparently did not actually mean what it said in *Mena*—that during a lawful detention, police may ask questions unrelated to the initial detention, so

long as the questions do not prolong the detention, at least not if the questions include a request for consent to search.

In her dissent in *Caballes*, Justice Ginsburg recognized that the factual scenario presented by this case was not before the Court there (nor was it before the Court in *Mena* or in any other case Kansas has found), leaving this an open Fourth Amendment question at least in that sense. A grant of certiorari here would permit the Court to put to rest the question whether *Mena*, *Bostick*, and *Caballes* have removed police questioning that does not prolong a lawful traffic stop from the second *Terry* inquiry, including in cases where officers request consent to search and such consent is voluntarily given. This is an important and recurring Fourth Amendment question confronted by the nation's law enforcement officers on a daily basis. This case presents an appropriate vehicle for resolving any remaining uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2008

APPENDIX

[Filed May 30, 2008]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 96,189

STATE OF KANSAS,

Appellant,

v.

LACEY RANA SMITH,

Appellee.

SYLLABUS BY THE COURT

1. Under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights, a passenger in a vehicle is seized when a law enforcement officer stops the vehicle through a show of authority and the passenger does not flee.

2. *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed. 2d 299, 125 S. Ct. 1465, (2005), does not alter the general rule that a law enforcement officer violates the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights by asking a passenger in a vehicle stopped for a traffic violation to consent to a search that is unrelated to the purpose of the stop.

3. An unconstitutional seizure may infect or taint a consent to search as well as any fruits of a law-enforcement-citizen encounter if the nature of the seizure renders the consent to search involuntary. Conversely, a voluntary consent to search can purge

the primary taint of an illegal seizure where the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 26, 2007. Appeal from Cowley district court; NICHOLAS M. ST. PETER, judge. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed and remanded. Opinion filed May 30, 2008.

Larry R. Schwartz, of Arkansas City, was on the brief for appellee.

James R. Spring, deputy county attorney, *Christopher Smith*, county attorney, and *Phill Kline*, attorney general, were with him on the brief for appellant.

The opinion of the court was delivered by

LUCKERT, J.: In *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed. 2d 299, 125 S. Ct. 1465 (2005), the United States Supreme Court held that law enforcement officers could ask questions unrelated to the purpose of a search when executing a warrant authorizing the search of a residence. This case raises the question of whether that decision alters our longstanding rule that a law enforcement officer violates the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights by asking a passenger in a vehicle stopped for a traffic violation to consent to a search that is unrelated to the purpose of the stop.

We conclude it does not. *Mena* does not overrule longstanding precedent limiting the scope of an investigatory detention, does not address the question of the scope of an investigatory detention, and is factually and legally distinguishable from this case.

Facts

In the early morning hours of September 22, 2005, Officer Nick Carter saw a vehicle with a broken taillight driving down a road in Winfield, Kansas. Carter followed the vehicle. Before he could signal the driver to pull over, the driver parked the vehicle in an angled parking space on the side of the street. Carter stopped his patrol car behind it and activated the emergency lights. While checking the license plate number with the dispatcher, Officer Carter noticed the vehicle had expired tags. The driver got out and approached the patrol car. Carter spoke to the driver about the reason for the stop (the broken taillight) and also asked him about the expired tag. When Officer Carter checked the vehicle's tag information and VIN number with police dispatch, he discovered that the tag was illegal. The driver told Carter that the car belonged to his girlfriend and he did not know anything about the tag. According to Carter's testimony, "the vehicle was going to be towed; [and] the driver was going to get a citation."

Lacey Smith, who was a passenger in the stopped vehicle, got out of the car and sat down on some nearby steps while Officer Carter spoke to the driver. Carter recognized Smith and knew her by name. He testified that Smith was not the registered owner of

the car or the license tag, and he did not believe Smith was the driver's girlfriend. Aside from briefly greeting Smith, Officer Carter interacted solely with the driver of the vehicle.

Meanwhile, Officer Cory Gale heard over the police radio that Carter had made the stop. Gale drove to the scene to provide backup assistance, a practice he indicated was common during nighttime stops. After seeing Smith sitting near the vehicle, Officer Gale also recognized her and determined she was a passenger. Based on information received sometime before this traffic stop, Gale suspected Smith possessed drugs and intended to ask her permission to search her purse. Gale approached Smith and asked how she was doing and if he could look inside her purse. Smith consented, and inside her purse, Gale discovered a bag containing methamphetamine. Officer Gale arrested Smith and took her to the police station.

Officer Carter was still in the process of issuing a citation to the driver when Officer Gale and Smith left the scene. At the police station, Gale discovered further incriminating evidence in Smith's possession, including drug paraphernalia. Smith also made some incriminating statements.

Procedural Background

The State charged Smith with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. Smith filed a motion to suppress the evidence seized during the search of her purse and person and to suppress her subsequent incriminating statements. At the hearing on the

motion, the State conceded that Officer Gale did not have reasonable suspicion to search Smith's purse. It argued instead that Smith consented to the search.

The district court found that Smith had been lawfully seized but the questions Officer Gale asked her at the beginning of the encounter exceeded the scope of the stop and were improper. The court also found that Smith's consent was given during the seizure and there was not a "sufficient attenuation of a seizure to justify the search." Therefore, Smith's motion to suppress was granted.

The district court subsequently granted the State's request for permission to file an interlocutory appeal. The State perfected its appeal to the Court of Appeals, where the district court's decision was reversed. In so ruling, the Court of Appeals rejected the State's contention that Smith was never "seized" by authorities. Rather, the panel concluded the broken taillight provided a basis for a legal seizure and Smith was subject to a *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), investigatory detention.

The panel pointed out that when Officer Gale arrived on the scene he immediately contacted Smith and questioned her about matters unrelated to the taillight. The Court of Appeals stated: "Prior to the case of *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed. 2d 299, 125 S. Ct. 1465, (2005), this would have rendered the seizure illegal because such questioning was unrelated to the purpose of the traffic stop and fell outside of the permissible scope of a *Terry*-based detention." Slip op. at 6. The panel concluded *Mena*

permits officers to question a person during a lawful detention about matters unrelated to the reason for the detention. Therefore, the panel found Gale could question Smith about matters unrelated to the purpose of the stop, *i.e.*, the broken taillight, so long as the questions did not increase the duration of the stop.

The Court of Appeals observed that Officer Gale asked Smith two questions in quick succession: how she was doing and whether he could search her purse. Neither of these questions, according to the panel, extended the length of the traffic stop. The panel highlighted the fact that Officer Carter was still in the process of issuing the citation to the driver when Officer Gale arrested Smith.

With regard to the question of Smith's consent, the panel stated it was not faced with the issue of whether her consent removed the taint of a prior violation of Smith's Fourth Amendment rights. This conclusion was explained by the panel's determination that Smith was "lawfully seized and had suffered no violation of her rights." Slip op. at 7–8. Thus, in the panel's view, it was left only with the issue of whether Smith's consent was voluntary.

Finding that Smith, under a legal detention, offered nothing to indicate she was forced or coerced in any manner to permit Officer Gale to search her purse, the Court of Appeals held that Smith's consent provided the legal basis for the search. Because the panel determined that the search of Smith's purse was legal, it also found that the evidence discovered in her possession at the police station and any

incriminating statements made later by Smith did not constitute fruit of the poisonous tree. The district court, therefore, was reversed.

We now consider Smith's petition for review.

Standard of Review

Our standard of review is well known. An appellate court reviews the factual underpinnings of the decision on a suppression motion by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. *State v. Thompson*, 284 Kan. 763, 772, 166 P.3d 1015 (2007). Appellate courts do not reweigh evidence, assess the credibility of witnesses, or resolve conflicts in the evidence. *State v. Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006); *State v. Jones*, 279 Kan. 71, 73, 106 P.3d 1 (2005). The State has the burden of proving that a search and seizure was lawful. *Thompson*, 284 Kan. at 772; *State v. Anderson*, 281 Kan. 896, 901, 136 P.3d 406 (2006).

The issue in this case arises under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights, which assure each person's right to be secure in his or her person and property against unreasonable searches and seizures. An analysis of the motion to suppress requires a determination of whether there was a seizure and whether the subsequent search was valid. *Thompson*, 284 Kan. at 772.

Was Smith Seized? A seizure occurs when there is a "show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is

not free to leave and the person submits to the show of authority." *State v. Morris*, 276 Kan. 11, 18–19, 72 P.3d 570 (2003). The law recognizes that a traffic stop is a seizure under the Fourth Amendment. *Thompson*, 284 Kan. at 773.

The seizure resulting from a traffic stop is analyzed as being more akin to an investigatory detention than an arrest. As a result, courts examine the reasonableness of a traffic stop under the principles set forth in *Terry v. Ohio*, 392 U.S. 1, and codified by the Kansas Legislature in K.S.A. 22-2402(1). *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979); *Thompson*, 284 Kan. at 773.

Terry is premised upon the basic Fourth Amendment right of each person to be secure in his or her person and property against unreasonable searches and seizures. 392 U.S. at 8; see *Ybarra v. Illinois*, 444 U.S. 85, 91–92, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979). This principle incorporates two precepts. First, "'the Fourth Amendment protects people, not places.' [Citation omitted.]" *Terry*, 392 U.S. at 9. Second, "'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' [Citation omitted.]" *Terry*, 392 U.S. at 9. Indeed, "the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 136 L. Ed. 2d 347, 117 S. Ct. 417 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250,

114 L. Ed. 2d 297, 111 S. Ct. 1801 [1991]); see *Thompson*, 284 Kan. at 792.

Terry breaks the analysis of the legality of traffic stops into two parts: (1) "whether the officer's action was justified at its inception" and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

Under the first prong of the test, in order to stop and detain a person, a law enforcement officer must have a reasonable suspicion that criminal activity is taking place, has taken place, or is about to take place. *State v. DeMarco*, 263 Kan. 727, 734, 952 P.2d 1276 (1998). Such activity includes traffic violations. See *Thompson*, 284 Kan. at 773.

Here, Officer Carter observed a taillight infraction and then discovered an illegal tag. These violations justified the stop, and Smith does not dispute the reasonableness of the driver's detention. Nor do the parties dispute that this case should be analyzed as a traffic stop even though the driver had parked the car before Officer Carter activated his lights.

Nevertheless, the State asserts that the valid investigatory stop of the vehicle triggered only a seizure of the driver, and the district court and Court of Appeals panel erred in ruling otherwise. With regard to Smith, the State contends the encounter was consensual. Pointing out that Smith was neither ordered to remain in the vehicle nor prevented from exiting the car, the State asserts: "That Smith chose to remain in the area does not mean she was not free to leave—she simply chose not to."

After the filing of the Court of Appeals' decision and the parties' briefs before this court, the United States Supreme Court decided *Brendlin v. California*, 551 U.S. ___, 168 L. Ed. 2d 132, 127 S. Ct. 2400 (2007), and held that a passenger in a vehicle is seized for Fourth Amendment purposes when a law enforcement officer stops the vehicle through a show of authority and the passenger does not flee.

In *Brendlin*, the Court rejected the same argument as asserted by the State in this case, *i.e.*, that the show of authority in a traffic stop was directed toward the driver and not toward passengers. The Court ruled that in pulling over a particular car, the law enforcement officer "acts with an implicit claim of right based on fault of some sort," and, understanding that, a reasonable passenger would "expect to be subject to some scrutiny" even though it is the driver who has committed a wrong. 168 L. Ed. 2d at 140. The Court noted that a passenger is present at the "physical focal point of an investigation," and at that point a reasonable person would not expect an officer to "let people move around in ways that could jeopardize his safety." 168 L. Ed. 2d at 140. Consequently, there exists a societal expectation of ""unquestioned [police] command"" at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. [Citation omitted.]" 168 L. Ed. 2d at 140.

A seizure does not occur simply because there has been a show of authority, however. There must be a submission to that authority. In *Brendlin*, the Court

considered whether a passenger, who has no control over the vehicle, submits to the law enforcement officer's authority. Noting that submission can be passive, the Court indicated "one sitting in a chair may submit to authority by not getting up to run away." 168 L. Ed. 2d at 142. Consequently, even though a passenger had "no effective way to signal submission while the car was still moving on the roadway, . . . once it came to a stop he could, and apparently did, submit by staying inside." 168 L. Ed. 2d at 142–43.

This approach is consistent with the test utilized in Kansas for determining if a seizure has occurred. See *State v. Morris*, 276 Kan. 11, 19, 72 P.3d 570 (2003).

In this case, it is not clear that the driver parked in response to the presence of the law enforcement officer and, apparently, there had been no show of authority by the officer at that point. That situation changed when Officer Carter pulled behind the car, blocked it, and activated emergency lights. A reasonable occupant in the car, whether a driver or a passenger, would understand the officer's actions to be a display of authority directed to everyone in the vehicle. In other words, "all the occupants were subject to like control by the successful display of authority." 168 L. Ed. 2d at 141.

Smith's submission to this authority is not as clear as was Brendlin's. Smith moved from the vehicle to sit on nearby steps rather than remaining in the car. Yet she did not walk away; she remained at or near the physical focal point of the investigation in a passive submission to the show of authority. Under

the totality of the circumstances, we affirm the district court's and Court of Appeals' determinations that Smith was seized for purposes of application of the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights.

Scope of Detention

Smith, while conceding the seizure was initially valid, contends her seizure became unlawful when Officer Gale exceeded the permissible scope of the stop. Before the district court and Court of Appeals she argued that the question asked by Officer Gale—something like, "can I look in your purse?"—was unrelated to the purpose of the traffic stop. Now that the Court of Appeals panel held that this scope argument is no longer valid in light of *Mena*, 544 U.S. 93, Smith argues the panel's broad interpretation and subsequent application of Mena erroneously changes established search and seizure law in Kansas.

Smith's argument rests on the second prong of the *Terry* test—whether the detention was reasonably related in scope to the circumstances which justified the interference in the first place.

Subsequent to the *Terry* decision, the United States Supreme Court has attempted to clarify this prong of the two-part test. In *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983), the Court determined "[i]t is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope *and* duration to satisfy the conditions

of an investigative seizure." (Emphasis added.) 460 U.S. at 500. Regarding the limitation on the duration of the traffic stop, the Court stated that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." 460 U.S. at 500.

To determine whether law enforcement officers have complied with the temporal limitation articulated for evaluating the propriety of a *Terry* stop, courts must "take into account whether the police diligently pursue[d] their investigation." *United States v. Place*, 462 U.S. 696, 709, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983). Specifically, courts examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985).

Applying these cases to traffic stops, Kansas appellate courts have defined the *Terry* test to mean that a law enforcement officer may request the motorist's driver's license, car registration, and proof of insurance; conduct a computer check; issue a citation; and take those steps reasonably necessary to protect officer safety. The stop can last only as long as necessary to complete those tasks, and those tasks must be diligently pursued. *Thompson*, 284 Kan. at 774; *DeMarco*, 263 Kan. at 734; see also K.S.A. 22-

2402(2) (during a *Terry* stop, if an officer "reasonably suspects that such officer's personal safety requires it, such officer may frisk such person for firearms or other dangerous weapons"). If no information raising a reasonable and articulable suspicion of illegal activity is found during the time period necessary to perform the computer check and other tasks incident to a traffic stop, the motorist must be allowed to leave without further delay. *Thompson*, 284 Kan. at 774; *State v. Mitchell*, 265 Kan. 238, 245, 960 P.2d 200 (1998); see also *State v. Damm*, 246 Kan. 220, 224–25, 787 P.2d 1185 (1990) (after citation written, driver could not be detained while records of passengers checked).

Decisions of the Tenth Circuit Court of Appeals are in accord, and that court routinely states the same general rules. *E.g.*, *United States v. Rosborough*, 366 F.3d 1145, 1148 (10th Cir. 2004). The Tenth Circuit takes the view that "'[a] detention for a traffic citation can turn into a consensual encounter after the trooper has returned the driver his documentation so long as a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information.' [Citation omitted.]" *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 (10th Cir. 2006).

Before the decision in *Mena*, 544 U.S. 93, the Tenth Circuit restricted the scope of any questions asked during a traffic stop to those related to the purpose of the *Terry* encounter. This was held to include questions regarding identification and weapons; other investigatory questions were not

allowed. See, *e.g.*, *United States v. Holt*, 264 F.3d 1215, 1227, 1230 (10th Cir. 2001) (weapons), *modified by United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007).

After the *Mena* decision, the Tenth Circuit adopted a broader approach to a law enforcement officer's questioning during a traffic stop, holding "there is no Fourth Amendment issue with respect to the content of the questions" if the stop's duration is not extended. *United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005); see also *Stewart*, 473 F.3d at 1268–69 ("suspicionless" questioning of a driver by law enforcement officer during course of traffic stop regarding weapons and contraband is not Fourth Amendment violation so long as it does not extend duration of traffic stop); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258–59 (10th Cir. 2006) (quoting *Wallace*).

The Court of Appeals relied upon this contemporary line of Tenth Circuit decisions in holding that the scope restrictions previously enforced in Kansas were altered by *Mena*. The panel's reliance on these cases was misplaced, however. Generally, those cases involved fact patterns where law enforcement officers asked questions and developed a reasonable suspicion of criminal activity because of the answers. That is not the situation in this case where the State concedes there was no basis for the search other than consent.

In addition, the Court of Appeals' analysis does not consider a line of cases in which some panels of the Tenth Circuit have recognized a distinction between

the permissibility of asking questions on any topic and of conducting a search based upon a question like "may I search?" In these cases, even though the Tenth Circuit panels allowed questions outside the purpose of a traffic stop, they held the searches were not constitutionally permissible. See *United States v. Valenzuela*, 494 F.3d 886, 891 n.2 (10th Cir. 2007) (recognizing and discussing distinction); *United States v. Yeomans*, 2007 WL 30032, at *4–5 (10th Cir. 2007) (unpublished) (rejecting passenger's argument that questions exceeded scope of stop but invalidating consent to search given during detention); *Guerrero-Espinoza*, 462 F.3d at 1304–08 (invalidating passenger's consent given after purpose of stop concluded because questioning extended stop that had not evolved into consensual encounter, and stating general rules regarding scope).

In reaching these holdings, each of the Tenth Circuit panels reiterated the pre-*Mena* view that a traffic stop must be completed and the driver's license returned before a search based upon consent could be valid. This conclusion was supported with precedent rooted in pre-*Mena* analysis, but there was no explanation of why the rule remains valid in light of the panel's expanded view regarding the permissible scope of a traffic stop. This lack of analysis leaves unanswered questions: Is the search invalid because the search exceeded the permissible scope of a *Terry* stop (as opposed to a question exceeding the scope)? Did the search impermissibly extend the duration of the vehicle stop? Or, was the consent involuntary? The lack of clarification diminishes the persuasiveness of the Tenth Circuit

cases and restrains us from resolving this case by simply citing those cases that are contrary to the Court of Appeals' decision.

Nevertheless, the Court of Appeals panel in this case incorrectly concluded that Tenth Circuit cases supported its holding. Consequently, the only remaining rationale for the panel's decision is its interpretation of *Mena*, an interpretation which we conclude was in error.

Mena was an action for damages under 42 U.S.C. § 1983 (2000). Iris Mena alleged the Fourth Amendment was violated when law enforcement officers detained her while they executed a search warrant in the house she occupied and, at the same time, asked her questions about her immigration status. She argued the questions were unrelated to the purpose of her detention, which was to look for deadly weapons and evidence of gang membership. 544 U.S. at 100–01. The federal court of appeals agreed. In addition, the court found the detention was not reasonable and that "the officers were required to have independent reasonable suspicion in order to question Mena . . . because the questioning constituted a discrete Fourth Amendment event." 544 U.S. at 100–01. See *Mena v. Simi Valley*, 332 F.3d 1255, 1264–66 (9th Cir. 2003).

The United States Supreme Court reversed. Initially, the Court focused on the reasonableness of Mena's detention, finding: (1) *Michigan v. Summers*, 452 U.S. 692, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981), allowed occupants of a residence to be detained while a search warrant was executed; (2)

the degree of force was appropriate for the circumstances; and (3) the 2- to 3-hour duration was necessary given the nature of the search. 544 U.S. at 98.

In addition, the Court considered the issue of whether questioning was a discrete Fourth Amendment event requiring independent reasonable suspicion. It stated:

> "The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. [Citation omitted.] This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have 'held repeatedly that mere police questioning does not constitute a seizure.' *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); see also *INS v. Delgado*, 466 U.S. 210, 212, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984). '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.' *Bostick*, [501 U.S.] at 434–35 (citations omitted)." 544 U.S. at 100–01.

Consequently, the Supreme Court concluded the questioning did not create an additional seizure of

Mena and, therefore, the law enforcement officers did not need reasonable suspicion to justify her interrogation. 544 U.S. at 101.

The *Mena* Court cited a traffic stop case, *Illinois v. Caballes*, 543 U.S. 405, 407, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005), as instructive. In *Caballes*, the Court held the Fourth Amendment does not require a reasonable, articulable suspicion to justify using a drug-detection dog to sniff the outside of a vehicle during a legitimate traffic stop as long as the duration of the stop is not extended. The Court concluded a dog sniff of a car's exterior did not compromise a legitimate privacy interest and, therefore, was not a search. 543 U.S. at 407.

The *Mena* Court's discussion of and reliance upon *Caballes* was limited to the question of whether, after the initial detention, there was an additional Fourth Amendment event—either a search (under the facts of *Caballes*) or a seizure (under the facts of *Mena*). Neither the *Mena* or the *Caballes* majority decisions discussed *Terry* nor the scope of a *Terry* stop. One of the *Caballes* dissenting opinions was based upon *Terry*, with the dissenters concluding the dog sniff exceeded the permissible scope of the *Terry* stop. The *Caballes* majority did not disagree with or even discuss this analysis. Rather, the majority's response seems to be a statement that the issue on which certiorari was granted "is narrow: 'Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.'" 543 U.S. at 407.

Although *Terry* is not discussed in *Mena*, *Michigan v. Summers*, 452 U.S. 692, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981)—the case cited by the Court as precedent for its conclusion that *Mena*'s detention was permissible—considered the application and rationale of *Terry*. In *Summers*, as in *Mena*, the Court considered the reasonableness of detaining occupants of a residence while a search warrant was executed. In Summers' case, he was descending the front steps of the residence when law enforcement officers encountered him, ordered him inside, and required him to remain during the search. The Court considered whether that initial seizure and the subsequent detention violated the Fourth Amendment.

Noting a general rule that probable cause must support a seizure if it is as intrusive as an arrest, the Court cited exceptions where the intrusion "'was so much less severe' than that involved in a traditional arrest that 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable. [Citation omitted.]" 452 U.S. at 698. One such circumstance is a *Terry* stop, where the Court "recognized the *narrow* authority of police officers who suspect criminal activity to make *limited* intrusions on an individual's personal security based on less than probable cause." (Emphasis added.) 452 U.S. at 698. The Court emphasized the differences in the character of and justifications for the seizure in a *Terry* stop as compared to Summers' detention. Speaking of the detention at issue in *Summers*, the Court noted:

> "Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." 452 U.S. at 701.

Later in the opinion, the Court returned to this point, noting: "The existence of a search warrant, however, also provides an objective justification for the detention." 452 U.S. at 703. The Court also noted:

> "[A] neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." 452 U.S. at 703–04.

Thus, in a *Summers* situation "the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." 452 U.S. at 705 n.19.

In contrast, in a *Terry* stop there is no warrant, and the stop occurs on the basis of a reasonable suspicion of a law enforcement officer rather than

upon a showing of probable cause considered by a detached magistrate. As the Court pointed out in *Summers*, the Fourth Amendment allows such a stop because of its limited nature and because the officer's authority is narrow. 452 U.S. at 698, 700 n.11. This does not mean that the officer has no authority. In fact, the Summers Court noted several investigative techniques were available; "'[t]he most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained.' 3 W. LaFave, Search and Seizure § 9.2, pp. 36–37 (1978)." 452 U.S. at 700 n.12.

Limiting interrogation to the individual's identity and the circumstances of the suspicious conduct was consistent with the Court's discussion of balancing the interests required by the Fourth Amendment. This view of the limited and narrow scope of a *Terry* stop was reaffirmed in *United States v. Sharpe*, 470 U.S. at 682, 686–87, when the Court emphasized that traffic stops must be minimally intrusive, diligently pursued, and a law enforcement officer's actions must be reasonably related in scope to circumstances which justified the initial interference.

More recently, the limited nature of the scope of questioning during a *Terry* stop was addressed in *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 185, 159 L. Ed. 2d 292, 124 S. Ct. 2451 (2004). In that case, law enforcement officers investigating an assault approached the defendant and asked for identification, which he refused to produce. He was arrested and convicted of

obstruction based upon a Nevada statute that required individuals to identify themselves if requested to do so by an officer during a *Terry* stop. The Court described the Nevada statute as a "stop and identify" provision and noted that many states have similar statutes. 542 U.S. at 182 (citing K.S.A. 22-2402[1] [2003]).

Hiibel argued (1) the request was not related to the purpose of the stop and, therefore, exceeded the constitutionally permitted scope of a *Terry* stop and (2) the refusal could not be criminalized in situations where there was no probable cause. The Court rejected both arguments under the facts of the case. Nevertheless, the analysis emphasized the limited nature of *Terry* inquiries.

The *Hiibel* Court began its analysis with the issue of whether the question was permissible. As the first step in answering this question, the Court considered whether asking the question constituted a seizure and concluded: "'[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.' [*INS v. Delgado*,] 466 U.S. 210, 216, 80 L. Ed. 2d 607, 104 S. Ct. 1758 (1975)." 542 U.S. at 185. *Delgado*, like *Mena*, focused on the issue of whether there was a seizure.

The next step of analysis in *Hiibel* marks the point where that decision (and this one) depart from *Delgado*, *Caballes*, *Mena*, and other cases addressing whether a discrete Fourth Amendment event has occurred. That next step is consideration of the constitutionally permissible scope of a *Terry* stop.

The *Hiibel* Court noted: "To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be "'justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.'" [Citations omitted.]" 542 U.S. at 185. The Court then noted that its "decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." 542 U.S. at 186.

Next, the Court addressed the second issue of whether the failure to respond to the request for identity could be criminalized. Noting that past decisions had left "an open question" of whether the suspect could be arrested and prosecuted for refusing to answer, the Court concluded "[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop." 542 U.S. at 187. The rationale of that conclusion was tied to the scope limitations of a *Terry* stop:

> "The request for identity has an *immediate relation to the purpose, rationale, and practical demands* of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration [citation omitted], or its location [citation omitted]. A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against

unreasonable searches and seizures." (Emphasis added.) 542 U.S. at 188.

The Court recognized the defendant's argument that the statute "circumvents the probable-cause requirement, in effect allowing an officer to arrest a person for being suspicious." 542 U.S. at 188. In addressing this concern, the Court emphasized once again the limited nature of the *Terry* stop:

> "Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and '*reasonably related in scope* to the circumstances which justified' the initial stop. . . . Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not *reasonably related to the circumstances* justifying the stop. . . . It is clear in this case that the request for identification was '*reasonably related in scope to the circumstances* which justified' the stop." (Emphasis added.) 542 U.S. at 188–89.

Four members of the Court dissented. Justice Stevens would have decided the case on Fifth Amendment grounds. Nevertheless, he noted that under *Terry* a law enforcement officer's question "'must be "reasonably related in scope to the justification for [the stop's] initiation."' [Citation omitted.]" 542 U.S. at 193 (Stevens, J., dissenting). In a separate dissent, three other justices concluded that criminalizing a failure to answer the question violated the limitations imposed in *Terry* and its progeny. 542 U.S. at 198 (Breyer, J., dissenting, joined by Souter and Ginsburg, JJ.). Thus, the entire

Court, in some form, reaffirmed the significant limitations on the scope of a *Terry* stop and did so in a manner consistent with Kansas' application of that limitation.

The opinion in *Hiibel* was filed on June 21, 2004. Approximately 6 months later, the Court decided *Caballes* (January 24, 2005) and 9 months later *Mena* (March 22, 2005). In those later opinions, the Court limited the issue to whether there was a discrete Fourth Amendment event—a search or a seizure—and did not address the scope of a *Terry* stop. In light of its recent reaffirmation of *Terry* principles in *Hiibel* and the careful limitation of the issue in *Caballes* and *Mena* to the question of whether there was an additional search or seizure, we are not persuaded that *Mena* can be read as an alteration or abandonment of the rules regarding the limited scope of a *Terry* stop.

Consequently, we hold that the Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search. Rather, we continue to adhere to our longstanding rule that consensual searches during the period of a detention for a traffic stop are invalid under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights. The district court correctly applied these precedents and concluded the request and subsequent search of Smith exceeded the scope of the purpose of her detention.

Was the Consent to Search Valid?

In addition, the district court concluded the consent to search was tainted by the impermissible detention. An unconstitutional seizure may infect or taint the consent to search as well as any fruits of the encounter if the nature of the seizure renders the consent to search involuntary. *Florida v. Royer*, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) (officer's detention of person beyond limited restraint of *Terry* investigative stop taints subsequent consent to search); see *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Conversely, a voluntary consent to search can purge the primary taint of an illegal seizure where the connection between the lawless conduct of law enforcement officers and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. *State v. Reason*, 263 Kan. 405, 409, 951 P.2d 538 (1997); *State v. Ninci*, 262 Kan. 21, 32, 936 P.2d 1364 (1997); see *State v. Childers*, 222 Kan. 32, 40, 563 P.2d 999 (1977).

The district court concluded there was no causal break allowing a dissipation of the taint in this case.

In *Childers*, we stated that this determination is a question of fact that will not be disturbed on appeal if it is supported by the evidence. 222 Kan. at 40–41.

Clearly, in this case the undisputed evidence supports the conclusion there was no causal break that would purge the taint. Indeed, there was no break between the violation of the scope restrictions and the search; the two are inextricably entwined. In turn, the knowledge that the purse's contents

revealed evidence of illegal conduct undoubtedly influenced Smith's decision to give a statement to police. Therefore, the evidence resulting from the search of Smith's purse was properly suppressed. See *Wong Sun*, 371 U.S. 471.

Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed and the case is remanded.

DAVIS and JOHNSON, JJ., not participating.

LARSON, S.J., and GREENE, J., assigned.[1]

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[1] REPORTER'S NOTE: Judge Richard D. Greene, of the Kansas Court of Appeals, was appointed to hear case No. 96,189 vice Justice Davis pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c). Senior Judge Edward Larson was appointed to hear the same case vice Justice Johnson pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616.

Court of Appeals of Kansas.
STATE of Kansas, Appellant,
v.
Lacey Rana SMITH, Appellee.

No. 96,189.

Jan. 26, 2007.

Review Granted May 8, 2007.

Appeal from Cowley District Court; Nicholas M. St. Peter, judge. Opinion filed January 26, 2007. Reversed.

MEMORANDUM OPINION

PER CURIAM.

Police searched the purse of Lacey Rana Smith following a traffic stop of the vehicle in which she was riding. The district court found that the questions by police to Smith prior to the search exceeded the scope of the initial stop. On that basis, it suppressed evidence obtained both in the search and later at the police station along with incriminating statements made by Smith after her arrest. The court certified the case for an interlocutory appeal, and the State now appeals the suppression order. Finding that Smith gave her voluntary consent to the search during a legal seizure of her person, we reverse.

In the early morning hours, Officer Nick Carter observed a vehicle with a broken taillight driving down the road. He followed the vehicle and saw it pull into an angled parking space and stop. Carter stopped his patrol vehicle behind it and activated the emergency lights. While checking the license plate

number with the dispatcher, Carter noticed the vehicle had expired tags. The driver got out and approached Carter to inquire about why he was being stopped. While Carter was speaking to the driver, Smith, a passenger, got out of the vehicle and sat down on some nearby steps. Aside from briefly greeting Smith, Carter interacted solely with the driver of the vehicle.

Officer Cory Gale heard over the police radio that Carter had made the stop. Gale arrived at the scene to provide backup support. Apparently, it is not unusual for officers to interact in this manner for nighttime stops. After seeing Smith sitting near the vehicle, Gale recognized her as someone he knew who might be in possession of drugs, and he surmised she was connected to the traffic stop. Gale approached Smith and asked how she was doing and if he could look inside her purse. Smith apparently immediately consented, and Gale discovered a bag inside of the purse containing a substance he believed to be methamphetamine. Gale arrested Smith and took her to the police station. Carter was still in the process of issuing a citation to the driver when Gale and Smith left. Carter did not hear any of the conversation between Gale and Smith. At the station, Gale discovered further incriminating evidence in Smith's possession. Smith also made some incriminating statements.

The State charged Smith with felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. Smith moved to suppress the evidence seized along with her subsequent

incriminating statements. At the hearing on the motion, the State conceded that Gale did not have reasonable suspicion to search Smith's purse. It argued instead that Smith consented to the search of her purse which then provided the legal basis for it.

It appears the district court found that Smith had been seized lawfully but that the questions Gale asked her at the beginning of the encounter exceeded the scope of the stop and were improper. It also found that any consent by Smith was given during a seizure and there was not a sufficient attenuation of a seizure to justify the search. The court then sustained the suppression motion.

On a motion to suppress evidence, we review the facts underlying the district court's suppression decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those facts by a de novo standard. In this case there is no dispute as to the facts. Therefore, the ultimate determination of suppression is a legal question requiring this court's independent constitutional appraisal of the significance of those facts. *State v. Gray*, 270 Kan. 793, 796, 18 P.3d 962 (2001).

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures of persons. "Section 15 of the Kansas Bill of Rights provides protection identical to that provided under the Fourth Amendment to the United States Constitution." *State v. Morris*, 276 Kan. 11, 17, 72 P.3d 570 (2003). A seizure occurs when "there is the application of physical force" or when "there is

a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of authority." 276 Kan. at 18–19.

The State argues that Smith was never seized by authorities at any time and her encounter with police was strictly a voluntary occurrence where she consented to a search of her purse. Smith counters that she was "seized illegally" and that any consent given after that did not remove the taint of the illegality since all the events occurred within a very short period of time.

We disagree with the State that Smith was never seized. A routine traffic stop such as here is a seizure under the Fourth Amendment. See *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995), *cert. denied* 518 U.S. 1007 (1996). The legality of that seizure then, becomes our first inquiry.

The scope and duration of a seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Under *Terry* and its progeny, an investigative detention must last no longer than is necessary to effectuate the purpose of the stop unless there is reasonable suspicion that some other crime has been or will be committed. See *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); *State v. Mitchell*, 265 Kan. 238, 244–45, 960 P.2d 200 (1998).

Clearly, the inoperable taillight provided Officer Carter with probable cause to make the original seizure of the vehicle in which Smith was riding. When Officer Gale arrived on the scene, he immediately contacted Smith and began to question her about matters unrelated to the taillight. Prior to the case of *Muehler v. Mena*, 544 U.S. 93, 161 L. Ed. 2d 299, 125 S. Ct. 1465 (2005), this would have rendered the seizure illegal because such questioning was unrelated to the purpose of the traffic stop and fell outside of the permissible scope of a *Terry*-based detention. *United States v. Holt*, 264 F.3d 1215, 1227, 1230 (10th Cir. 2001) (declining to adopt a rule permitting officers to ask questions irrelevant to the purpose of the stop even if the questions do not elongate the duration of the stop); *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988) (Subsequent or concurrent detentions for questioning are justified only when the officer has "reasonable suspicion 'of illegal transactions in drugs or of any other serious crime.' (*Royer*, 460 U.S. at 498–99, 103 S. Ct. at 1324."); *State v. Schneider*, 32 Kan. App. 2d 258, 263, 80 P.3d 1184 (2003) (officers conducting a traffic stop acted outside the scope of the stop when they pulled over a vehicle for committing a minor traffic infraction and then proceeded to question the occupants about their purchase of cold pills, never asked the defendant for his driver's license, registration, or proof of insurance, and there was no indication that the officers planned to issue the defendant a citation for the traffic infraction). Pursuant to the Supreme Court's holding in *Mena*, however, police officers may now question a person

during a detention about matters unrelated to the reason for the detention. 544 U.S. at 102.

"In light of the Supreme Court's decision in . . . *Mena*, . . . a trooper can validly ask questions during a lawful traffic stop that are unrelated to the stop. See *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258 (10th Cir. 2006) (holding, in light of *Mena*, that as long as officer's questioning does not extend length of traffic detention, there is no Fourth Amendment issue regarding the content of the officer's questions); *United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005) (same)." *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 n.6 (10th Cir. 2006).

Here, since the initial stop was legal, it was permissible for Gale to question Smith about matters unrelated to the purpose of that stop so long as the questions did not increase the duration of the stop. Gale asked Smith two questions in quick succession: how she was doing and whether he could search her purse. Neither of these questions extended the length of the stop. Carter was still in the process of issuing the citation to the driver when Gale arrested Smith. So even if Smith was seized, the seizure did not extend beyond the permissible scope of a legal traffic stop.

We are not faced with the issue, as Smith argues, of whether her consent removed the taint of a prior violation of her Fourth Amendment rights. She had been lawfully seized and had suffered no violation of her rights. We are left only with the issue of whether Smith gave her consent voluntarily. When a person gives consent to search during a legal detention or a

voluntary encounter, the consent is valid if it was voluntary under the totality of the circumstances. *State v. Reason*, 263 Kan. 405, 413, 951 P.2d 538 (1997).

Smith has offered nothing to indicate she was forced or coerced in any fashion to allow Officer Gale to search her purse. That consent, therefore, provides the legal basis for the search. With the legality of the original search established, the evidence found in her possession later at the police station and any incriminating statements she gave later were not then fruit of the poisonous tree.

Reversed.

114 (3) 10-27-08

No. 08-245

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner,

v.

LACEY RANA SMITH, Respondent.

On Petition for a Writ of Certiorari to the Kansas Supreme Court

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BRIEF IN OPPOSITION

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Respondent Lacey Rana Smith respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Kansas Supreme Court in this case.

Reasons for Denying the Writ

1. Petitioner did not raise the issue presented in its petition in the lower courts.

Both at the state trial court and in the state appellate courts, the State of Kansas only argued that officers did not seize Ms. Smith and, therefore that the Fourth Amendment was not implicated in any way. At the state district court, the prosecutor argued that the "the State's contention that this contact with Ms. Smith does not rise to the level of seizure, was a voluntary encounter with Officer Gail between him and Ms. Smith, and the consent given was free of duress or coercion." Feb. 13, 2006 Transcript at 16. The prosecutor conceded that it did not have reasonable articulable suspicion of criminal activity on the part of Ms. Smith. Feb. 13, 2006 Transcript at 16. The state trial court held, *without objection*, that, if the stop constituted a *Terry* stop, it

> must be limited in it's duration and nature to the surrounding circumstances that justify the original stop to begin with. That being the duration can't be longer than what would be necessary to complete the underlying basis for the stop. And the questions asked and the investigative techniques used must be designed to basically verify or dispel the circumstances of the original stop. [Feb. 13, 2006 Transcript at 26.]

The state trial court went on to hold that the encounter was a *Terry* stop and "the question was beyond the scope allowed for a Terry detention." Feb. 13, 2006 Transcript at 31.

In its interlocutory appeal, the State of Kansas did not dispute the holding regarding the application of a scope limitation during an investigatory detention. The State of Kansas only argued that "The district court was incorrect when it concluded that appellee had been seized by law enforcement when the driver of the vehicle in which she was a passenger was being detained for traffic offense." Appellant Br. at 3 (statement of issue). The bulk of the State of Kansas'

argument dealt with its assertion that the encounter did not amount to a *Terry* stop and therefore did not implicate the Fourth Amendment. In passing, the State of Kansas did argue in the alternative that "[i]f defendant was seized, that seizure did not run afoul of the concerns addressed in *State v. Damm*, 246 Kan. 220, 787 P 2d 1185 (1990). The seizure did not exceed reasonable scope and duration." Appellant Br. at 13. Again, the State of Kansas state did not contest the law that there is a scope limitation during a *Terry* stop.

The Kansas Court of Appeals agreed with the district court that Ms. Smith had been seized by law enforcement. See Pet. App. 32a. But the Kansas Court of Appeals held, sua sponte, that *Muehler v. Mena*, 544 U.S. 93 (2005) changed the law regarding the scope limitation during a *Terry* stop and, therefore, it was permissible for Officer Gail to question Ms. Smith about matters unrelated to the purpose of the traffic stop. Pet. App. 34a. The State of Kansas did not respond to Ms. Smith's petition for review to the Kansas Supreme Court.

The Kansas Supreme Court granted review of the Kansas Court of Appeals' decision. The State of Kansas did not file a supplemental brief in the Kansas Supreme Court addressing the scope question and, in fact, waived oral argument in the Kansas Supreme Court. *See* Kansas Appellate Court Docket. As a result, the issue presented in the State of Kansas' petition before this Court has never been presented to the state trial or appellate courts.

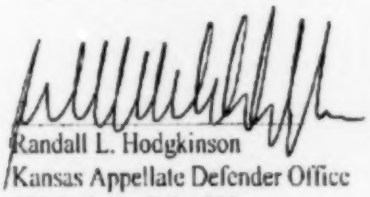
Respondent recognizes that for purposes of this Court's jurisdiction, if the lower court considers and disposes of a federal question, it may be irrelevant whether the parties properly presented the question. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979). But the fact that the state has never sought to litigate this issue in state court provides evidence that this case is a poor vehicle to resolve the question. Even if this Court *can* reach the issue, the failure to argue the

issue to the Kansas Supreme Court, even after it was decided by the Kansas Supreme Court provides a prudential basis for denying the writ in this case.

Conclusion

Because the precise issue presented to this Court has never been pressed by the State of Kansas in the lower courts, this case is a poor vehicle for certiorari review. This Court should deny the petition.

Respectfully submitted,



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No. 08-245

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

LACEY RANA SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY TO BRIEF OF RESPONDENT LACEY RANA SMITH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The sole reason that respondent opposes Kansas's petition is the irrelevant assertion that the State did not brief and argue the question presented at every stage in the lower courts. Respondent fails to address the split of authority of which the Kansas Supreme Court decision in this case is a part, and Respondent makes no effort to defend that court's decision on the merits.

Respondent's contention that a lack of full briefing and argument on the question presented in the lower courts provides a "prudential basis" for denying the writ, Brief in Opposition (hereinafter "Opp'n") at 3, is both misguided and irrelevant. Respondent rightly concedes that the fact that the Kansas Supreme Court actually decided the constitutional question presented confers jurisdiction on this Court. Opp'n at 2–3.

Indeed, it is well-settled that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). As far back as 1914, the Court recognized its authority to review federal questions decided by state courts, even though a particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). There, the Court observed that, "it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Id.*; *see also, Raley v. Ohio*, 360 U.S. 423, 436 (1959); *Payton v. New York*, 445

U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). Respondent doesn't even suggest, nor could she, that the lower court considered and decided the question now before this Court on anything other than federal constitutional grounds. Pet. App. at 1a–28a. Respondent's attempt to blur the Court's jurisdictional line with an argument of prudential concern is wholly without merit. The fact that her opposition brief relies solely on this red herring further suggests that Respondent recognizes that the question presented involves a conflict of authority and merits this Court's plenary review.

Respondent's argument aside, the Fourth Amendment question before the Court remains open and subject to continuing debate in the lower state and federal courts. Without question, the intersection of the Court's decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005) and *Muehler v. Mena*, 544 U.S. 93 (2005) has resulted in differing opinions on the scope of the second prong under *Terry v. Ohio*, 392 U.S. 1 (1968), presenting a recurring and real issue for law enforcement officers.

Kansas is acutely aware of the practical problem the Kansas Supreme Court's decision creates, because that court's decision in this matter is in direct conflict with decisions on the same question by the Tenth Circuit, the federal Circuit in which Kansas is located. *See, e.g., United States v. Stewart*,

473 F.3d 1265, 1269 (10th Cir. 2007) (if the initial detention is lawful, the Fourth Amendment inquiry is whether police questioning extended the length of the detention; the content of the question is irrelevant). The outcome of this conflict is apparent and troubling—Kansas law enforcement officers now effectively operate under conflicting Fourth Amendment holdings. Kansas law enforcement officers could engage in a traffic stop and questioning with results that would be inadmissible in Kansas state courts but completely admissible in a prosecution by the United States Attorney in federal court. If the difference were a matter of the Kansas Supreme Court independently interpreting the Kansas Constitution, that result would be a necessary outcome of federalism. But here the difference arises solely because the Kansas Supreme Court and the Tenth Circuit have adopted different answers to the same Fourth Amendment question.

Moreover, the Kansas Supreme Court's decision here is at odds not only with the Tenth Circuit, but also with the decisions of several other Circuits and state courts of last resort. *See* Pet. at 11–13. The question presented was implicated in *Caballes*, *see* 543 U.S. at 421 n.3 (Ginsburg, J., dissenting), but not resolved by the Court. Like many Fourth Amendment issues, the question presented here arises with some frequency. It has percolated long enough to generate numerous decisions in the lower courts and a split of authority, *cf. Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting), and this case offers an appropriate vehicle to answer the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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